[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
October 19, 1933.
[APPELLATE CIVIL JURISDICTION]
HUGGARD, C.J., THOMAS, C.J.,
(F.M.S.), and GERAHTY, J.
November 30, 1933.

R. M. N. L. LETCHUMANAN CHETTIAR
Plaintiff
(Appellant)

vs.

A. L. V. ALAGAPPA CHETTIAR Administrator of the Estate of A. L. V. KASIVISVANATHAN CHETTIAR deceased (substituted under Order of Court dated the 10th day of May, 1933).....Defendant
(Respondent)

[MALACCA CIVIL SUIT No. 250 of 1931]
[SINGAPORE APPEAL No. 18 of 1933]

Bill of Exchange — Promissory Note — Tavanai letter — Promise to pay — negotiability by custom — Bills of Exchange Act, 1882, S.3.

A *Tavanai* letter in the form commonly used among the Chettiar community, which does not contain an express or implied promise to pay, is not a promissory note within the meaning of section 83 of the Bills of Exchange Act, 1882, notwithstanding that it is negotiable by the custom of Nattukottai Chettiars.

Before a document can, by custom and usage of trade, be recognised by the Courts as a negotiable instrument, the document must be in a form which renders it capable of being sued upon by a holder of it *pro tempore* in his own name and there must appear from the terms of the document some indication that it is intended to be transferable. A *Tavanai* letter, possessing neither of the above attributions, is not negotiable by indorsement.

Trial of action before Mills, J.

Munro for the Plaintiff.

G. W. de Silva for the defendant.

The material facts are set out in the Judgment below.

Cur. Ad. Vult.

MILLS, J.—In this action the plaintiff sued as indorsee of an instrument which is described in the Writ as a "letter of acknowledgment"; he alleged that this instrument is negotiable by indorsement. The issue whether or not an instrument is negotiable is an issue relating to mercantile law, and therefore, under Section 5 of Ordinance No. 111 (Civil Law), the law to be applied is the law of England.

Counsel for the plaintiff maintained that according to the law of England the instrument is to be recognised as negotiable on three grounds.

First, Counsel contended that the instrument was a Promissory Note as defined in Section 83 of the Bills of Exchange Act, 1882.

I find that a correct rendering of the instrument is as follows:—

> "Written by Alagappa. Received on this date $3,000 cash. This sum of three thousand dollars has been credited to your account as payable at the end of 3 months with interest at the rate of ¾ per cent. Having paid interest and principal according to the time specified, I must get back this manuscript letter."

The instrument is written by "A. L. V. Alagappa Chettiar": it is addressed to "O. R. M. N.": on the reverse it is indorsed "O. R. M. N. Nagappa Chetty."

The statutory definition of a Promissory Note is as follows:—

> "A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer."

I held that the instrument was not a promissory note for 2 reasons:—

(a) there is no promise to pay: the words "having paid" do not contain a promise to pay, and even if the sense is "I must pay.....and get back this manuscript letter," there is still no promise to pay, but merely an acknowledgment of liability to pay; as an acknowledgment of liability to pay is consistent with a declaration of inability to pay, such an acknowledgment cannot be held to contain a promise to pay; for instance, a person might say to his tailor "I admit that I owe you £30, but I see no prospect of my being able to pay you, and therefore I cannot make any promise to pay":

(b) there is no promise to pay a specified person or bearer: Counsel submitted that the payee was indicated with reasonable certainty as required by section 7 of the Bills of Exchange Act, 1882, since the Court ought to infer that the payee was the person to whom the letter was addressed;

In my opinion, however, to draw such a conclusion in the circumstances of this case where Chettiar bankers are concerned, would not be to draw an inference but merely to indulge in a speculation; I considered that the Court should be guided by the decision of Murison, C. J. in the case of *Raman Chetty* vs. *Veerappa Chetty*, (1931 S.S.L.R. p. 30) where it was held that the absence of the name of a specified person prevented the instrument from falling within the definition of a promissory note.

Secondly, Counsel contended that the instrument was negotiable by the custom of Chettiar bankers and money-lenders in Malacca, and that therefore its negotiability ought to be recognised

by the Courts, as being part of the law merchant to which the Courts give effect under the common law.

It is not necessary to consider whether such a custom was proved in the present case, because even if it was proved, the existence of such a custom in Malacca is not sufficient to warrant the Courts in recognising negotiability: it is the custom of merchants in England which has to proved: this is clear from the decision and from the judgments of the Judges in the Court of Appeal in the case of *Picker* vs. *London and County Banking Co.*, (18 Q.B.D. p. 515); the words of Fry, L.J. are entirely opposite "It being clear, therefore, that the custom in this country must be looked to in order to determine whether these instruments were negotiable, in the present case there was no evidence of any custom here to treat them as negotiable instruments."

Moreover, I doubt whether the form of the instrument renders it capable of being sued on by the holder of it *pro tempore* in his own name: cf.Halsbury Vol. 2. p. 723.

Thirdly, Counsel contended that the defendant was estopped from denying the negotiability of the instrument.

The basis of this contention is that the defendant has made a representation on the face of the instrument to the effect that he contemplates that it will be negotiated, and that having done so, he will not be permitted in a Court of Equity to deny that the instrument is negotiable.

This question is considered in Smith's Leading Cases, 13th Edition, at p. 543.

The representation made on the instruments mentioned in the reported cases consists of such indications as the words " to bearer " " to order " " to assigns " " to the party lodging this document with me." In the present instance, I found no representation on the face of the instrument that the person who signed it contemplated that it would be negotiated: I therefore held that the defendant was not estopped from denying the negotiability of the instrument.

When the plaintiff had closed his case, the defendant submitted that there was no case for him to meet: as the plaintiff had failed to prove to my satisfaction that the instrument was negotiable or that the defendant was estopped from denying its negotiability, I upheld the defendant's submission and dismissed the plaintiff's claim.

Solicitors for the Plaintiff—*Allen & Gledhill.*

Solicitor for the Defendant—*G. W. de Silva.*

From the above decision the Plaintiff appealed. The Appeal came on for hearing at the Singapore Court of Appeal before Huggard, C. J., Thomas, C. J., (F.M.S.), and Gerahty, J.

Roland Braddell & E. A. Stevens for the Appellant.

S. *Veerasamy & G. W. de Silva* for the Respondent.

Roland Braddell with *E. A. Stevens* for appellant.

The case should be sent back for further hearing on any of three grounds.

(1) The plaintiff was clearly the equitable assignee of this debt and the assignor having parted with all his interest need not have been joined, *Brandt's Sons & Co.* vs. *Dunlop Rubber Co.*, L.R. 1905 A.C. 454.

Hon. Mr. S. Veerasamy objected to the point being taken as it had been withdrawn by Counsel in the Court below.

Rolnad Braddell. The point was not withdrawn but Counsel in the Court below thought that they could not sue on the equitable assignment without joining the assignor and they said that they did not ask the Judge to decide whether they could join him or not. In any event an abandoned point can be raised on appeal if the other side are not prejudiced, *Lingangowda & ors.* vs. *Basangowda*, L.R. 54 I.A. 122. No. evidence was called for the defence as the Judge non-suited the appellant; the defence therefore cannot be prejudiced. It is true the point was not pleaded but the defence themselves set up the question of notice of the endorsement of the Tavanai letter and that let in the evidence as to the equitable assignment. The Court has that evidence before it and the parties are bound by the course of the trial, *Kelly* vs. *Metropolitan Ry. Co.*, L.R. 1895, 1 Q.B. at p. 946; *Bell* vs. *Lever Bros.*, L.R. (1931) 1 K.B. 557, (1932) A.C. 161; *Banbury* vs. *Bank of Montreal*, L.R. (1918) A.C. 626. In any event leave to amend the pleadings can be given, *Kurtz* vs. *Spence*, L.R. 36 C.D. 770.

(2) The Tavanai letter is a promissory note. Strict attention should not be paid to the language of an Asiatic document but the Court must reach the true meaning of the parties.
A promise to pay can be inferred, *Wheatley* v. *Williams*, 150 E.R. 546, *Brooks* vs. *Elkins*, 150 E.R. 675 and the other cases collected in footnote (f) at p. 4 of *Byles on Bills*, 18th Ed. The meaning and effect of a Tavanai letter is shown in *Lakshmanan Chetty* vs. *Commissioner of Income Tax, Madras*, A.I.R. 43 Mad. 629; *Board of Revenue* vs. *Pethapermal Chetty*, A.I.R. (1929) Mad. 34; *Muthiah Chetty* vs. *Ramanathan Chetty*, 43 I.C. 972; *Annamalai Chetty* vs. *Letchman Chetty*, 36 I.C. 497.

(3) Even if not a promissory note and not negotiable by custom under the law merchant, the custom amongst Chettiars *inter se* is proved to be that such documents are negotiable by endorsement. The parties here are both Chetties and section 92, proviso 5, and section 48 of the Evidence Ordinance enable the custom to be provided. The evidence is not inconsistent with the document; it merely adds to the terms of the document.

Veerasamy with *G. W. de Silva* for the Respondent.

The question whether the plaintiff was an equitable assignee or not cannot be raised now. It was neither pleaded nor put in issue in the Court below. The point if taken was abandoned in the Court below and could not be taken now. An appellant is not entitled to raise upon his appeal a new case inconsistent with that he originally raised in the primary Court, even though the evidence taken in that Court supports the new case, *Ex Parte Reddish, In re Walton*, (1877) 5 Ch. D. 882. Where a point is not taken in the Court below, and evidence could have been adduced there which by any possibility could prevent the point from succeeding it cannot be taken afterwards. *Ex Parte Firth, In re Cowburn*, (1882) 19 Ch.D. 419. Where the omission to raise it was deliberate it could not be raised now, *Hickman* v. *Kent or Romney Marsh Sheep Breeders Association*, (1920) 37 T.L.R. 163. A point not having been raised in the County Court was not allowed to be raised on appeal, *Moriarty* v. *Regents Garage & Engineering Co., Ltd.*, (1921) 2 K.B. 766 and the same course was taken in *Nelson, Murdock & Co.* v. *Wood*, (1922) 126 L.T. 745.

A Tavanai letter is not a promissory note. It does not come within the definition of S. 83 of the Bills of Exchange Act. It is merely an instrument evidencing a deposit and not a promissory note, *Sibree* v. *Tripp*, (1846) 15 M. & W. 23 at p. 29, *Mortgage Insurance Corporation* v. *Commissioners*, L.R. 21 Q.B.D. 352. The cases collected in Mitra on Limitation 6th. Edn: at p. 1202 show that the Indian Courts have treated a Tavanai transaction as merely a deposit.

A Tavanai letter does not become negotiable by custom amongst Chettiars. A custom must be recognised by merchants outside the particular section of the community before the Courts could give recognition to it in such a manner as to clothe the document with all the attributes of negotiability. Even custom or usage of trade however extensive will not render a document negotiable unless it appears on the face of it to be payable to bearer. The Tavanai letter in question is not on the face of it payable to bearer. *Crouch* v. *The Credit Foncier of England Ltd.*, (1873) L.R. 8 Queen's Bench Cases p. 374. *Goodwin* v. *Roberts*, (1875) L.R.10 Ex. Cases p. 337; (1876) L.R. 1 A.C. p. 476. *Merchant Banking Co. of London* v. *Phoenix Bessemer Steel Co.*, (1877) L.R. 5 Ch.D. p. 205. *Easton* v. *London Joint Stock Bank*, (1886) L.R. 34 Ch.D. p. 95. *Lord Sheffield* v. *The London Joint Stock Bank and others*, (1888) L.R.13 A.C. p. 333. *The London & County Banks Co., Ltd.*, v. *The London River Plate Ltd.*, (1887) L.R. 20 Q.B.D. p. 232; (1888) 21 Q.B.D. p. 535. *Bechuanaland Exploration Ltd.*, v. *London Trading Bank Ltd.*, (1898) L.R. 2 Q.B.D. p. 658.

Cur. Ad. Vult.

HUGGARD, C. J.—This was an action tried before Mills, J. at Malacca in which the Plaintiff sued on a Specially Indorsed Writ for $3,198.40 balance due by the Defendant to the Plaintiff for money advanced to the Defendant on current account on a letter of acknowledgment dated the 15th day of November, 1928, made in favour of O. R.. M. N. and indorsed by the latter to the Plaintiff, including interest up to the 30th day of October, 1931.

The letter of acknowledgment referred to above is a document commonly used in connection with loan transactions amongst the Chettiar community and is called a *Tavanai* letter. The original of the document in question is in the Tamil language, and in the course of the hearing before the learned trial Judge three different translations of the document appear to have been considered. In the Court of Appeal Counsel for the Appellant handed in a further translation and as this was agreed to by Counsel for the Respondent I accept it, for the purposes of this appeal, as a correct rendering of the document sued on. The main difference between this final translation and those considered by the learned trial Judge is that it preserves the word "Tavanai."

This translation is as follows:—

"Malacca

Oona Ravenna Mana Navenna.

30th Arpisi of the year Vibhava (15-11-1928). Alagappan writes:

Cash received on this date is $3,000. We have credited this (sum of) dollars Three thousand in your name on three months "Tavanai" at 3/4 interest. We shall receive this signed letter on payment of principal and interest according to "Tavanai."

(Sd.) A. L. V. Alagappa Chettiar."

At the conclusion of the Plaintiff's case in the Court below the learned trial Judge held that the Defendant had no case to meet inasmuch as the Plaintiff had failed to prove that the document sued on was negotiable or that the Defendant was estopped from denying its negotiability. The learned Judge therefore dismissed the Plaintiff's claim. From that decision the Plaintiff has appealed.

The contention of the Appellant is that the learned trial Judge should have found for the Plaintiff on any one of the following grounds:—

(a) The document sued on is a negotiable instrument; or

(b) The document by the custom of Nattukottai Chettiars is, as amongst themselves, negotiable by indorsement; or

(c) the Plaintiff was the equitable assignee of the debt evidenced by the document sued upon.

I propose to consider these grounds of appeal in the order stated.

In support of the first ground of appeal it is contended on behalf of the Appellant that this *Tavanai* letter is a negotiable instrument because it is a promissory note.

A promissory note is defined in section 83 of the Bills of Exchange Act, 1882, as an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specific person or to bearer.

A promissory note need not be in any particular form but, as its title indicates, it must contain a promise to pay. It is true that the promise need not be in any particular form (*Wheatley* v. *Williams*, 150 E.R. 546; *Brooks* v. *Elkins*, 150 E. R. 675) but it must be contained in the terms of the document itself either expressly or by necessary implication. If there are no words amounting to a promise, the instrument is merely evidence of a debt, and may be received as evidence as such between the original parties (Byles on Bills, 19th edition, page 5), but the instrument is not a promissory note.

Now can it be said that the *Tavanai* letter in the present case contains an express or an implied promise to pay? The answer to this question turns entirely on legal construction, and in my view the answer is in the negative.

Counsel for the Appellant contended that the words in this *Tavanai* letter *mean* a promise to pay and that such a document is the Chetty's way of promising to pay: in other words, that the parties intended the *Tavanai* letter to be a promissory note. In support of this contention Mr. Braddell referred us to the following observation in the Judgment of the Privy Council in *Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* reported in 6 Moore's Indian Appeals page 393, at page 411:—

> "Deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Naturally I accept this proposition but I do not consider that it justifies the importation into a document of something which cannot properly be deduced from the terms of the document itself.

In any event, if we turn to the Record in the present case and endeavour to ascertain therefrom the intention of the parties, we find in the first place that the Writ describes the document sued on as a "letter of acknowledgment" and not as a promissory note, and, in the second place, that the evidence given on behalf of the Plaintiff is that although it is the custom amongst Chetties to stamp promissory notes it is not the custom to stamp *Tavanai* letters. In face of this it seems to me impossible for the Appellant to contend successfully that this *Tavanai* letter was *intended* to be a promissory note and not a mere acknowledgment of money lent.

Counsel for the Appellant also relied on the appearance in the original Tamil document of the word *Tavanai*, and we were informed that this word indicates that the loan is for a definite period. I am not satisfied, however, that the word "*Tavanai*" expressly or by implication imports into the document a definite promise to pay.

Further, even if a promise to pay could properly be deduced from this document I should still feel considerable doubt whether the document could be accepted as a promissory note. In *S. V. L. L. Lakshmanan Chettiar* v. *Commissioner of Income Tax, Madras*, (1929 All India Reporter, 675) it is explained that the *Tavanai* system is a system under which interest is agreed to be paid at certain periods and in default of such payment interest remaining unpaid becomes part of the principal and the whole sum carries interest at the rate agreed upon. It appears to follow from this that, failing regular payments of interest, the principal sum may be constantly varying in amount, and if this be so it seems to me to be extremely doubtful whether the principal sum could be regarded as a "sum certain" so as to bring the document within the statutory definition of a promissory note.

I consider it sufficient, however, to base my decision regarding this ground of appeal on the fact that in my opinion this *Tavanai* letter does not expressly or by implication contain a promise to pay and therefore it cannot be a promissory note. I hold therefore that the Appellant fails on this ground of appeal.

The second ground of appeal is based on the contention that this *Tavanai* letter is, by the custom of Nattukotai Chettiars, negotiable as amongst themselves by indorsement. The real question to be considered here is whether, assuming that the existence of such a custom can be proved, the Court can properly recognise and give effect to it.

It is well established that before a document can, by custom and usage of trade, be recognised by the Courts as a negotiable instrument two requirements must be complied with. One of these requirements is the form of the instrument itself, and the other is the custom of trade in regard to it. It must be in a form which renders it capable of being sued on by the holder of it *pro tempore* in his own name, and it must be by the custom of trade transferable, like cash, by delivery. Failure to comply with either of these requirements prevents the instrument being a negotiable instrument at all (Halsbury's Laws of England, 2nd edition, volume 2, page 723 and the cases there cited).

In the present case, if I correctly follow the argument of Mr. Braddell for the Appellant, he does not seriously contend that the *Tavanai* letter in question complies with the two requirements mentioned above. It is, I think, admitted that this document is not capable of being sued upon by the holder of it *pro tempore* unless he happens to be a member of the Chettiar community, and, that being so, it cannot in my opinion be a negotiable instrument.

But what Mr. Braddell does contend is that, although the *Tavanai* letter may not be a negotiable instrument in the wider sense, it is, by custom of the Chettiar community, transferable by indorsement as between members of that community, and he argues that the Courts can properly recognise that custom and treat the instrument as negotiable. In my opinion the fatal objection to this contention is that before any document can be regarded as transferable by custom there must appear from the document itself some indication that it is *intended* to be transferable. In the *Tavanai* letter now under consideration there is no such indication. Mr. Braddell argues, however, that evidence may be led to show that, according to the custom of the Chettiar community, some words indicating transferability, such as "or his assigns," must be imported into the document. In support of this argument proviso 5 to section 92 of the Evidence Ordinance is relied on. In my view the importation of any such words would result in a direct variation of the terms of the document and therefore could not be permitted.

It is relevant to observe here that in *The London and County Banking Company, Limited* v. *The London and River Plate Bank Limited,* (20 Q.B.D. 232) and in *Merchant Banking Company of London* v. *Phoenix Bessemer Steel Company,* (5 Ch. D. 205)—the two cases upon which Mr. Braddell mainly relied in support of his argument that the Courts will recognise negotiability as between members of a particular trade or particular section of the community—the documents sued upon contained clear words indicating transferability.

I have therefore come to the conclusion that in the absence from the terms of the document itself of something indicating transferability the Courts could not properly treat this *Tavanai* letter as negotiable by custom. In my opinion the Appellant fails on this ground of appeal also.

Having arrived at this conclusion it seems unnecessary to say more regarding this second ground of appeal, but I might add that in the absence of very clear authority on the matter I should find great difficulty in satisfying myself that the Courts could properly recognise and give effect to a custom limited not merely to a certain geographical area but to a certain section of the community *within* that area, or that a document could be capable of being sued upon by the holder of it provided he was a member of a particular section of the community, whereas it would confer no right of action upon a holder outside that section of the community.

The third and final ground of appeal is that the learned trial Judge should have found for the Plaintiff on the ground that he was the equitable assignee of the debt evidenced by the document sued upon.

No such point was raised in the pleadings: indeed it is admitted that if this action had been based, even alternatively, on an alleged equitable assignment the Plaintiff would not have been entitled to proceed by way of Specially Indorsed Writ. The point, however, was argued to some extent in the Court below without any amendment of pleadings, but it is in my view clear from the notes of evidence, and from the fact that the learned trial Judge omits any reference to it in his grounds of decision, that the point was eventually abandoned by the Plaintiff.

In these circumstances the question arises whether the Appellant should now be allowed to rely on this point and should at this stage be given liberty to make the necessary amendments in his pleadings so as to enable the point to be disposed of in the present action. In my opinion he should not. It seems clear that by his pleadings and by the action of his Counsel in the Court below the Plaintiff elected to stand or fall on the terms of the document itself. This being so I do not think he can properly claim that the question as to equitable assignment should be disposed of in the present action, but at the same time I consider that he should not be precluded, by any order made in the present action, from bringing any such further proceedings as he may be advised.

In these circumstances I would dismiss this appeal with costs but without prejudice to the right of the Appellant to bring a fresh action in respect of the alleged assignment.

THOMAS, C.J. (F.M.S.)—This is an appeal from a judgment of Mills, J. dismissing the plaintiff's claim in respect of a document which is called a "Tavanai" letter.

The statement of claim was endorsed on the writ, and stated that

> "The plaintiff's claim is for $3,198.40 balance due by the defendant to the plaintiff for money advanced to the defendant on current account on a letter of acknowledgment dated the 15th day of November, 1928 made in favour of O.R.M.N. and endorsed by the latter to the plaintiff including interest up to the 30th day of October, 1931, particulars of which are hereto annexed:
>
> **PARTICULARS.**
>
> Principal due on a letter of acknowledgment dated 15th November, 1928 made by A. L. V. Allagappah Chettiar for and on behalf of the defendant firm Ahna Lana Veina in favour of O.R.M.N. and endorsed over by the latter in favour of the plaintiff. $3,000.00."

Then follow various calculations of interest making a total balance of the sum claimed at the 30th of October 1931.

The statement of defence amongst other defences stated that the defendant had no right to sue on the said letter of acknowledgment, as it was not transferable by endorsement it not being a negotiable instrument.

At the hearing evidence was called for the plaintiff, and at the close of the evidence the defendant submitted that there was no case to meet. That objection was sustained on the ground that the plaintiff had failed to prove to the satisfaction of the learned Judge that the instrument was negotiable or that the defendant was estopped from denying its negotiability.

The principal grounds of the appeal are that the document sued on is a negotiable instrument; the document by custom of Nattukottai Chettiars is, as amongst themselves, a negotiable instrument; the plaintiff was the equitable assignee of the debt evidenced by the document sued upon.

The last ground of appeal is in respect of a matter which has not been pleaded either directly or indirectly in the statement of claim, and admittedly could not have been properly included in a statement of claim endorsed on a Writ.

It has, however, been alleged in the argument that the defendant has in no wise been prejudiced in view of the statement of defence and of the argument which took place before the learned trial Judge. The appellant asks for leave, if necessary, to amend his pleading.

At the hearing of the appeal a fresh translation of the letter of acknowledgment was put in and accepted by the respondent. This letter is as follows:—

> "Omnipresence of God Siva.
> Malacca.
>
> Oona Ravenna Mana Navenna.
>
> 30th Arpisi of the year Vibhava (15.11.1928) Alagappan writes:—
> Cash received on this date is (dollars) 3,000. We have credited this (Sum of) Dollars three thousand in your name on three months 'Tavanai' at ¾ interest. We shall receive this signed letter on payment of principal and interest according to 'Tavanai'
>
> (sd.) A. L. V. Alagappa Chettiar"

In dealing with a document which has been translated from an eastern language the intention of the parties should be regarded without undue emphasis being placed on the exact wording of the document.

This question arises immediately since it has been urged that the inteion of the "Tavanai" letter is to promise to pay. That is an essential in a promissory note.

After every allowance that it is possible to make for the intention of the parties and without following too strictly the exact wording of the document, I cannot find that this "Tavanai" letter does make any promise to pay. It is a record of a transaction stating the amount, the period, and the rate of interest.

The word 'Tavanai' has been employed. It has been explained that 'Tavanai' indicates a period of rest. Where a sum has been credited according to 'Tavanai' and is not repaid at the time stated, it is continued for another similar period at the same rate of interest, and where any portion of the interest has not been paid, it is added to the principal, and also bears interest at the same rate. Thus once the term has expired there would seem to be no certainty as to the amount of the principal which may have been increased by the non-payment of interest.

Such an arrangement does not and cannot import in fact or by intention a promise to pay.

Before passing from this matter I would wish to mention that, so far as I am aware, there has been no endorsement of the payment of any sum by way of interest, although the particulars attached to the Writ indicate the payment of various sums by way of interest; and also that the document has not been stamped as a promissory note. These two facts bear out the construction I have placed on the document itself.

The next ground of appeal is that the document is by custom of Nattukottai Chettiars, as amongst themselves, negotiable by endorsement.

Only evidence was heard at the trial on behalf of the plaintiff. This did not suggest that 'Tavanai' letters might be negotiated outside the members of the Chetty community. In fact at the hearing of the case the most that was

claimed was that there was a custom amongst the Chetties themselves to treat these documents as negotiable, and that they are therefore amongst themselves estopped from denying negotiablity. For the purposes of this judgment I must assume that so much of the plaintiff's case has been made out and that a custom or usage has been proved that 'Tavanai' letters are treated as amongst Chetties as negotiable, as long as they remain in the hands of Chetties.

In Smith's Leading Cases (13th Ed.) Volume 1, page 533, a rule is suggested for the determination of negotiability. It is as follows:—

> "Where an instrument is by the custom of trade transferable in this country, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or though it is accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor (apart from the question of estoppel) will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferee have not a good title to it, and the transfer be made out of market overt."

That is the general rule of the Law Merchant.

I have referred to a great number of cases and where they have been held to be negotiable I have invariably found words of negotiability either in the instruments themselves or in documents so connected with the instruments as to be considered to impart to the instruments the incidents of negotiability. I refer again to Smith's Leading Cases, at page 535, where it is submitted as at least extremely probable, that if the right of suing on an instrument should not appear upon the face of it to be extended beyond one particular individual, no usage of trade, however extensive, would be allowed by the Courts (at least in the case of an English instrument) to confer upon it the character and incidents of negotiability.

In my opinion there are no words in the 'Tavanai' letter which indicate that the right of suing upon it is extended beyond a single individual.

Is it possible to introduce such words by usage? But in all contracts as to the subject matter of which usages prevail, parties are found to proceed with the tacit assumption of the usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify those known usages, which are included, as of course, by mutual understanding; evidence therefore of such incidents is receivable. (See Halsbury, Volume 10, page 261, paragraph 483). In the case of *Goodwin* v. *Robarts and others*, L R. 10 Ex. Cases, page 337, Benjamin, Q.C. argued that the scrip in question was not by the law merchant negotiable, and no usage of trade, no consensus of merchants could make it so.

The scrip referred to contained the following words:—

> "Received the sum of twenty pounds being the first instalment of 20 per cent, upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial Government."

The bonds agreeable to the terms of the scrip were payable to bearer.

Cockburn, C. J. delivered what I would wish with all respect to call a masterly judgment. He reviewed the position of the Law Merchant, and he dealt very fully with a number of cases.

At page 352 of the judgment are the following words:—

> "It is true that this scrip purports, on the face of it to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered stands in the place of that document, which when delivered, will be beyond doubt the representative of the sum it is intended to secure."

So it will be seen that in that case the scrip was so connected with a bond payable to bearer that it was held to be identified with it, and to use the words of Cockburn, C. J. "The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money by treating it as such" (page 353).

At page 357 he says:—

> "We must by no means be understood as saying that merchantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision and having been sanctioned and adopted by the Courts, have become, by such adoption, part of the Common Law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against

one which has become settled and adopted by the Common Law as to one in conflict with the more ancient rules of the Common Law itself."

In conclusion he said:—

"If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to usage incompatible either with the Common Law or with the Law Merchant as incorporated and embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving effect to a usage, now become universal to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery."

So in that case also it was held that the security was expressly made transferable to bearer; and the argument of Benjamin, Q.C. that the scrip in question was not by the law merchant negotiable, and no usage of trade, no consensus of merchants could make it so was met not by saying that an instrument which was not negotiable could be made so by usage of trade or consensus of merchants but by a finding that it was on the face of it expressly made transferable to bearer. I have no hesitation in thinking that if Cockburn, C. J. had been of the opinion that an instrument not on the face of it expressly made transferable to bearer could be made so by any usage of trade or consensus of merchants, he would not have hesitated to have so found. The fact that he did not do so and left this part of the case untouched seems to me to be a very strong argument against the proposition now advanced. For that is what the alleged custom would import. I am satisfied that the custom which it is now sought to set up is incompatible with the Law Merchant both in the attempt to introduce negotiability where no such words appear on the face of the 'Tavanai' letter and also in limiting the transferability to members of the Chetty Community.

If the latter part of the contention were upheld, it could only be sued upon by Chetties and not by any member of the public into whose hands it might come and who was holding it *pro tempore*.

The effect of any such finding would be to reduce the law Merchant from one of general application to a series of local laws merchant which would be a source of danger to the commercial community.

I am, therefore, of opinion that this second ground of appeal also fails.

With regard to the last ground of appeal, an equitable assignment was not pleaded and admittedly could not have been pleaded by an endorsement on the Writ. The matter may have been mentioned in the Court below, but the defendant was not prepared to meet such a case. The matter was not dealt with by the learned trial Judge.

It is obvious that this Court would not be in a position to deal with the question by any amendment that could be made. The statement of claim would have to be amended by some means. The respondent had intimated that there is a defence which he would have to plead. As far as the witnesses are concerned, those who gave evidence would have to be recalled for cross-examination, and it also might be necessary for them to supplement the evidence which they have already given. The proceedings would be cumbered by the other issues raised and already disposed of. Therefore it seems to me to be better and cheaper to refuse the amendment and to dismiss this appeal with costs here and below. But this is to be without prejudice to a second action dealing with the subject of this proposed amendment.

GERAHTY, J.—This is an appeal from the judgment of Mills, J., dismissing the claim of an indorsee of an instrument known as a "Tavanai Letter" against the administrator of the estate of the deceased maker of the document in question.

The learned trial Judge, on the submission of counsel for the defendant that there was no case to answer dismissed the suit at the close of the plaintiff's case.

The appellant appeals on the following grounds:—

(1) that the document sued upon is a promissory note and is a negotiable instrument; or

(2) that the document by the custom of Nattukottai Chettiars is, as amongst themselves, negotiable by endorsement; or

(3) that the plaintiff is the equitable assignee of the debt evidenced by the document sued upon.

The learned trial Judge held that the document was not a promissory note on the grounds that it contains no promise to pay and further it contains no promise to pay a specified person or bearer.

As to the second ground of appeal the Judge held that even if such a custom was proved, the existence of such a custom in Malacca is not sufficient to warrant the Courts in recognizing

negotiability, and that on the authority of *Picker* v. *London & County Banking Coy*, 18 Q.B.D. 515 it is the custom of merchants in England which has to be proved.

As to the third ground of appeal no finding is recorded and it is clear from page 49 of the notes that the Court was not asked to decide upon the point now raised.

I will now deal with the issues in the order in which they are raised in the grounds of appeal, setting out firstly the material terms of the document as rendered in the agreed translation submitted by counsel during the hearing of this appeal.

Malacca.

Oona Ravenna Mana Navenna.

30th Arpise of the year Vibhava

(15-11-1928) Alagappa writes:—

> Cash received on this date is $(3,000). We have credited this (sum of) Dollars three thousand in your name on three months "Tavanai'' at ¾ interest. We shall receive this signed letter on payment of principal and interest according to "Tavanai".
>
> (sg) A. L. V. Alagappa Chettiar.

The first question to be considered is whether this document can be construed to be a Promissory Note and is negotiable as such.

Now the first essential of a promissory note is that it must contain an unconditional promise by the maker to pay a sum certain in money to, or to the order of, a specified person or to bearer. If it does not contain such an unconditional promise then the document is not a promissory note.

I am asked to construe the words "We shall receive this signed letter on payment of principal and interest according to "Tavanai" having regard to the other terms of the document. It is disclosed in the evidence that "Tavanai" means the period allowed, at the end of which the money is payable, and according to the system of Tavanai there may be a continuous succession of such periods in the event of non-payment of principal and interest, the latter in each case being added to the principal at the same rate of interest. It is argued that these words, especially in their original Tamil rendering involve a promise to pay. The cases of *Wheatly* v. *Williams*, 150 E.R. 546 and *Brooks* v. *Elkins*, 150 E.R. 675 have been cited in aid of the proposition that the promise need not be couched in any particular way or wording.

In the latter case it was held that a document in the following words may be a promissory note "I.O.U. £20 to be paid on 22nd instant." In my view there is a vast distinction between the words in that document and the words in this particular instrument.

In the former case the maker records that he owes a certain sum of money to be paid on a specified date, in the present case the marker in effect ackowledges receipt of a sum of money in the nature of a loan or deposit for a specified period and at a specified rate of interest and records that he shall receive the document back on payment of principal and interest on the basis of *Tavanai*.

In other words the maker, in my view, merely ensures that he will get back his document when he pays whatever sum may then be due. I am unable to infer from those words an unconditional promise to pay a sum certain in money and the document cannot therefore in any circumstances be a promissory note.

The document in question is not dissimilar to that under consideration in *Hopkins* v. *Abbot*, (1875) L.R. 19 Eq. 222. There a banker's deposit note running: "Received of Mr. C. £150 to be accounted for on demand," and signed was not treated as a promissory note.

Counsel for the respondent has cited a number of Indian cases to show that similar documents in India have not been treated by the Courts as promissory notes for purposes of stamping or in regard to limitation.

Be that as it may, no direct authority has been cited either way to show whether a document in the nature of a *Tavanai* letter has or has not been held to be a promissory note. It must, I think, depend upon the wording in each case and cannot be dealt with in general. Here I am only concerned with this particular document and in my view it cannot be construed to be a promissory note.

I am also of opinion that this document does not present the requisites of negotiability.

In the notes to *Miller* v. *Race*, 1 Smith L.C. (ed. 13 p. 524 at p. 533 the learned author says:

> "It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable in this country, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in the market overt. But that if either of the above requisites be wanting, i.e. if it be either not accustomably transferable, or though it be accustomably transferable, yet, if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore* it is not a negotiable instrument."

It is not, I think, seriously contended that this document is capable of being put in suit by a party holding it *pro tempore* assuming for one moment that such party is not a member of the Chettiar Community.

The next question for decision arising out of the second ground of appeal is whether this document is by custom negotiable as among the members of the Chettiar Community *inter se* and in considering this question I am going to assume from the evidence of custom led in the Court below that the custom sought to be established has in fact been established and as I understand the submission of counsel for the respondent he has no objection to this course being taken.

Assuming then that among the members of the Chettiar Community a document of the description of a *Tavanai* letter, is regarded as and is treated, (save as to stamping) as negotiable amongst themselves can this Court give recognition to such a custom and read negotiability into a document which on its face discloses no such attribute?

I can conceive of no better answer to this question than is contained in the comments in the judgment of Manisty, J. in *The London & County Banking Coy*: v. *London & River Plate Bank*, 20 Q.B.D. at page 239. The learned Judge states as follows:—

> "Then comes another important matter to be considered as to the negotiability. It seems to be the opinion of eminent lawyers, though I do not say that it has been actually judicially determined, that if the right of suing upon an instrument does not appear upon the face of it to be extended beyond one particular individual, no usage of trade, however extensive, will confer upon it in the character of negotiability."

If that is a correct statement of the law I fail to see how a usage limited to one section of the community can confer upon the document in issue the character of negotiability even as between its members.

Again in *Eastern* v. *London Joint Stock Bank*, L.R. 34 Ch. D. at p. 113 Lord Justice Bowen says:—

> "But then one must be careful to see that one is not ascribing to the commercial world a custom or habit which prevails only in a particular market or particular section of the commercial world and before one draws the broad inference which was drawn by consent, be it observed, in the case of *Goodwin* v. *Robarts*, (L.R. 10 Ex. 337 & 1 A.C. 478) I should hesitate, and ask myself whether the thing had been thoroughly thrashed out and whether the true inference taken on the evidence as a whole and viewed by the light of strict commercial law, was not perhaps that these bonds were treated as negotiable in a certain class of the commercial world, without actually rising to the level of documents which the commercial world in general treated as negotiable or which were negotiable by the law merchant."

I am unable to infer from this that judicial recognition should or can be given to the negotiability of documents by limited usage, even as between parties to such usage, where such documents are not treated as negotiable generally or by the law merchant.

Moreover Mr. Braddell for the appellant has been unable to cite any case where such a position has arisen between members of the same trade or section of the community.

In the absence of express authority, for I am unable to infer authority from any of the cases cited, I am not prepared to hold that there can be such a thing as a form of negotiability in any particular document, limited by custom to members of a certain section of the community, to which the Courts should accord recognition in the absence of words on the face of the document indicating negotiability.

Further I am of opinion that Proviso 5 to Section 92 of Ordinance No. 53 (Evidence) will not admit of words, not expressly mentioned, being added to the document so as to vary its terms and to confer upon it negotiability.

Accordingly I take the view that the appellant must fail on his second ground of appeal.

As to the last ground of appeal which involves a point which was not pleaded or dealt with in the Court below but merely alluded to by counsel in the course of arguments or other issues, I am of opinion that any form of amendment which might be made would not enable this Court to adjudicate upon the matter. I therefore agree that it is not expedient to allow any amendment and I would dismiss the appeal with costs here and below but without prejudice to the appellant's right to take such further proceedings as he may be advised in respect of the alleged assignment.

Appeal dismissed.

Solicitors for the Appellant—
Allen & Gledhill.

Solicitor for the Respondent—
G. W. de Silva.